Filed 3/30/10 P. v. Oliver CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LUIS JOHN OLIVER, Defendant and Appellant.	A124732 (Mendocino County Super. Ct. Nos. SCWLCRCR-08-84289-02 & SCWLCRCR-09-89304-03)

Defendant Luis John Oliver was convicted of vehicle theft and accessory to carjacking and placed on probation. After he pleaded guilty to a charge of aggravated assault in connection with a separate incident a few months later, his probation was terminated. He was sentenced to separate terms for the aggravated assault and each of the earlier charges. Defendant contends the trial court erred in imposing consecutive sentences on the vehicle theft and accessory to carjacking charges because they were based on the same conduct. We agree and modify the judgment.

I. BACKGROUND

Defendant was charged in an information, filed June 16, 2008, with carjacking (Pen. Code,[1] § 215, subd. (a)), vehicle theft (Veh. Code, § 10851, subd. (a)), and accessory to carjacking (§§ 32, 215, subd. (a)).

At trial, the victim testified he was driving home one night in his truck when two men he had "seen . . . around" flagged him down and asked for a ride. The victim let the

[1] All statutory references are to the Penal Code unless otherwise indicated.

men into the front seat, defendant sitting next to the victim and another man, identified later as "Reggie," sitting next to the passenger door. As the victim drove, the two men directed him into the town of Covelo, eventually asking to be let out. As the victim pulled over, Reggie leaned over, grabbed the victim, pulled a knife, and forcefully told him to leave the truck. After the victim complied, Reggie jumped over defendant into the driver's seat and attempted to drive the truck. When Reggie was unable to get the truck into gear, defendant took over and drove off.

The victim's truck was later found crashed into a fence. Two investigating police officers saw defendant and Reggie emerge from a drainage ditch near the crash site, walking about 30 yards apart. Defendant, smelling strongly of alcohol, spontaneously said to the officer who approached him, "Is this about that black truck? . . . I really fucked up this time." The second officer approached Reggie but did not take him into custody. According to the officer who arrested defendant, "At the time, my partner [who spoke with Reggie] didn't know [Reggie's] involvement, and he was allowed to leave the area."

Defendant later waived his *Miranda*[2] rights and spoke with the officer. He acknowledged driving the car after Reggie was unable to get it into gear. Defendant explained he was not aware in advance that Reggie intended to steal the car but went along with the crime because he was afraid of Reggie.

On the basis of this evidence, defendant was acquitted of carjacking but found guilty of vehicle theft and accessory to carjacking. On October 2, 2008, the trial court suspended imposition of sentence and placed defendant on three years' probation.

Less than five months later, and only two weeks after defendant was released from custody, defendant was charged in a separate complaint, filed February 17, 2009, with attempted murder (§§ 187, 664), three counts of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), and dissuading a witness by force or threat (§ 136.1, subd. (c)(1)). In connection with each of the assault counts, it was alleged defendant had inflicted great bodily injury upon the victim. Although the record

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

is vague as to the incident underlying these charges, it appears defendant and two other men beat three acquaintances after an evening of drinking turned ugly.

Defendant pleaded guilty to a single charge of assault with force likely to produce great bodily injury. Defendant's probation for the prior offenses was terminated, and he was sentenced to the aggravated term of four years on the assault charge and one-third consecutive midterms each for the vehicle theft and accessory to carjacking charges, for a total sentence of five years four months.

Defendant's counsel objected to the consecutive sentences for the two theft-related convictions, arguing, "The conduct that he was convicted of on these two counts is exactly the same conduct. It happened at exactly the same time and it was exactly the same actions. [¶] He was in the car. The co-defendant basically attacked the driver of the vehicle, drove him out of the car, tried to drive the car, couldn't get it to run. [¶] At that point [defendant], in his alcoholic—alcohol-diminished condition, moved to the driver's seat and drove the car away. That was the accessory to the carjack . . . , and that was the [vehicle theft] that he was also found guilty of. [¶] There's no difference in the conduct whatsoever. Everything he did to commit one of those crimes was exactly the same conduct at exactly the same time as the other crime."

Rejecting the objection, the court noted, "Well, I think they are separate instances of criminal conduct, that either allowing—once the crime is committed, further acts that are undertaken to either harbor or conceal or prevent the apprehension of a principal or a codefendant are, under the law, separate acts that justify imposition of separate sentences. [¶] And I recall researching that issue at the time of the original trial. And I think just given all his criminal history, the increasing nature of his offenses, the fact he was on probation when these offenses occurred, and also the fact that—just the factors in aggravation outweigh those in mitigation, that consecutive sentences are warranted as to each charge, and as to the resentencing in the combined sentence on the two cases."

II. DISCUSSION

Defendant contends the trial court violated section 654, subdivision (a) when it imposed consecutive sentences for vehicle theft and accessory to carjacking because both convictions are based on the same conduct.[3]

"Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct. [Citations.] If, for example, a defendant suffers two convictions, punishment for one of which is precluded by section 654, that section requires the sentence for one conviction to be imposed, and the other imposed and then stayed." (*People v. Deloza* (1998) 18 Cal.4th 585, 591–592.) The trial court has broad latitude to determine whether section 654 applies in a particular case, and we review a determination under section 654 for substantial evidence. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564.)

While recognizing the deference that must be afforded the trial court's sentencing decision, we cannot uphold the imposition of consecutive sentences for vehicle theft and accessory to carjacking under the circumstances presented here. As defendant argues, both the vehicle theft and the accessory to carjacking charges were based on the same, single course of conduct: his taking the wheel after Reggie was unable to get the truck into gear and driving off. There was no evidence of any other act, not part of this course of conduct, that could support either charge. Under section 654, subdivision (a), the trial court was required to impose a sentence for the charge carrying the longer potential term and impose but stay the other sentence. (*People v. Deloza, supra,* 18 Cal.4th at p. 592.)

The trial court's comments at sentencing do not justify a different result. Although the court acknowledged the general principle of section 654, and noted "they are separate instances of criminal conduct," it did not explain what acts constituted those

[3] Section 654, subdivision (a) reads: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

separate instances of criminal conduct. Instead, when explaining its decision to impose consecutive sentences, the court referred to "[defendant's] criminal history, the increasing nature of his offenses, the fact he was on probation when these offenses occurred, and also the fact that—just the factors in aggravation outweigh those in mitigation," without addressing the existence of separate acts of criminal conduct.

In arguing in support of the consecutive sentences, the Attorney General does cite additional conduct. While both convictions were based on defendant's driving of the stolen truck, it is argued the conviction for accessory to carjacking was also based on defendant's telling the police officer, "Is this about that black truck? . . . I really fucked up this time." The Attorney General characterizes these comments as intended to divert suspicion from Reggie and thereby aid his escape.

We find two flaws in this argument. First, because defendant's comments were not argued to be a criminal act either at trial or during sentencing, it is unlikely this was the reasoning of the jury when it convicted defendant or the trial court when it imposed the sentences. In closing, the prosecutor told the jury the conduct underlying each of the charges was defendant's driving the truck away. His comments to the officer were cited merely as evidence confirming his involvement in the crime, rather than as a separate attempt to aid Reggie. The prosecution's argument at sentencing did not address the issue of separate acts at all. Accordingly, although the trial court did not articulate the basis for its conclusion there were separate criminal acts when imposing sentence, there is no reason to believe it silently thought up and adopted the Attorney General's novel theory.

Second, substantial evidence does not support a finding defendant possessed the necessary intent of intending to aid Reggie. Defendant's brief and profane comments, by which he indicated he had made a mistake with respect to the black truck, were a spontaneous admission. Because the comments made no mention of Reggie and did not purport to be a comprehensive account of the events surrounding the theft, there is no reason to believe defendant intended by implication to divert suspicion from Reggie—or had any intent toward Reggie at all. Further refuting such an intent, when defendant soon

after spoke more fully with the police, he thoroughly implicated Reggie. Nor did his statement have the actual effect of assisting Reggie. While the exact reason for Reggie's release was left ambiguous by the testifying officer, he did not claim it was related in any way to defendant's statement.

III. DISPOSITION

The judgment is modified as follows: the eight-month sentence for accessory to carjacking is stayed, the stay to become final upon defendant's completion of his sentence on the charge of vehicle theft under the June 16, 2008 information. (*People v. Boyd* (1990) 222 Cal.App.3d 541, 576–577.)

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Margulies, J.

We concur:

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Marchiano, P.J.

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Dondero, J.